plaintiff explain that the subsequent option agreement with the oil company (Exhibit D11) was for $40,000? The plaintiff should have known this if he had negotiated the lease through Balwant Singh as alleged by him. In my opinion he did not know about this until the hearing of the suit and in fact he instructed his solicitors to write to the defendant on December 5, 1969 and to the oil company on December 5, 1969, mentioning the initial rental of $60,000 (see Exhibit P4). Even his solicitor's letter dated May 11, 1970 (Exhibit D2) reiterated that the initial payment was $60,000.

In my opinion the defendant's version could on the balance of probabilities be true and I accept his story. There was therefore no privity of contract between the parties.

I believe the defence story that Exhibit P1 was produced by Balwant Singh and this accounted for his inability to type down the identity card numbers of both the plaintiff and the defendant. I cannot accept the story of the plaintiff that it was produced by the defendant with the dates already typed before signatures in anticipation that the initial rental for the land was $70.000. Ordinarily documents in the nature of Exhibit P1 were prepared by the brokers.

Even if the plaintiff's story were to be accepted as true, in my opinion his claim would also fail. According to him, the consideration of $60,000 was an executed consideration, that is liability was outstanding on the part of the defendant only and it was conditional that the commission be paid "on completion and payment for the lease of the above land by BP Malaysia Berhad". Thus at the time of entering into the contract, according to Exhibit P1, both parties had agreed that contract for payment of the commission of $9,000 was on the executed consideration of the plaintiff having procured the agreement of BP Malaysia Berhad that the plaintiff would be paid $60,000 on the lease. This turned out not to be the case. The defendant about a week later had to enter into an option for a much lesser amount of $40,000. Even this option expired after a series of renewals and a new option was entered into some years later where the defendant was to be paid a sum of $48,000.

The plaintiff's counsel argued that since the plaintiff had successfully brought the parties together he should be paid his commission nevertheless and he quoted the case of *Abdulla Ahmad* v. *Animendra Kissen.*[2] With respect in that case the appellant who was the broker was authorised by the respondent to sell a property for a sum and agreed to pay a commission if the appellant would find a buyer to purchase the property and the commission payable to be paid varied in accordance with the price to be sold subject to a minimum price. The appellant found a purchaser for the property for a higher price than the minimum price and therefore he was entitled to his commission. However the facts of this case are substantially different. The counsel for the plaintiff also argued that the plaintiff was in the position of the defendant's agent for the purpose of negotiation with the oil company. It might very well be but the fact remains that the agreement Exhibit P1 was entered into on the assumption that the plaintiff had already successfully negotiated a lease for the defendant for a sum of $60,000.

As regards the defence that the consideration was illegal, I find that the defendant had not seriously pursued this point. When the marketing officer of BP Malaysia Berhad (DW2) gave evidence he was not asked why Balwant Singh was asked to resign in 1968. It was not proved either whether it was illegal for a sales representative to accept a commission from a land owner after a successful negotiation of a lease with the company. The defendant's defence in this respect therefore fails.

Regarding the defence that the lease had not yet been completed, I am of the opinion that if the lease for which the defendant had been substantially paid is the same as the one they contracted for under Exhibit P1, then such a lease for all intents and purposes has been completed. The fees for the subdivision had been paid and a petrol station has been in operation by BP Malaysia Berhad on the land. However for reasons stated above the lease for which the parties herein contracted for has never materialized and therefore could not be said to have been completed.

The plaintiff's claim is therefore dismissed with costs.

Claim dismissed.

Solicitors: *Atma Singh Gill & Co.; N. Ramachandran & Co.*

GURPAL SINGH v. KANANAYER & ANOR.

[O.C.J. (Mohamed Zahir J.) December 11, 1975]
[Seremban — Originating Motion No. 65 of 1975]

Land Law — Enquiry held before Assistant Collector of Land Revenue — Chargee appealing against his decision dismissing application — Whether Assistant Collector has powers to hear pleadings and defences which have arisen in cases ordinarily heard by courts — National Land Code, ss. 260, 261, 340(1).

This was an appeal by the chargee against the decision of the Assistant Collector of Land Revenue who dismissed the chargee's application for an order of sale of a piece of land under section 260 of the National Land Code charged by the respondent to the chargee. The Assistant Collector considered allegations of fraud, mistake, *non est factum*, limitation, non-compliance with the Moneylenders Ordinance, the Stamp Ordinance and the Evidence Ordinance. The issue arising therefrom was whether the Assistant Collector had the powers under section 261 of the National Land Code to hear pleadings and defences which arise in cases ordinarily heard by the courts.

Held: (1) the collector has no powers to adjudicate on the pleadings which were ordinarily heard in the Courts;

(2) the powers of the Collector in the enquiry should be limited. He should not go behind the charge in view of section 340(1) of the National Land Code relating to indefeasibility of title or interest and only the High Court possesses the power to set aside any registered interest of a proprietor, chargor or lessee in any land title;

(3) the order of the Assistant Collector was set aside without prejudice to either party to take any fresh action to court.

Cases referred to:-

(1) *Ragavaniadoo* v. *Supramaniam Chetty* (1914) 1 F.M.S.L.R. 139.

(2) *Suppiah* v. *Ponnampalam* [1963] M.L.J. 202.

(3) *Tan Peng Pan* v. *Wong Fook Shang* [1973] 1 M.L.J. 31.

ORIGINATING MOTION.

S. K. Linggam for the appellant.

Khaw Yew-Mei (Miss) for the respondents.

Mohamed Zahir J.: These two Motions were fixed to be heard together but in view of the fact that Originating Motion No. 67 of 1975 is a cross appeal dependent on the outcome of Originating Motion No. 65 of 1975 it was decided to hear the Originating Motion No. 65 of 1975 first and that Originating Motion No. 67 of 1975 be decided on the result of Originating Motion No. 65 of 1975.

Motion No. 65 of 1975 is an appeal by the appellant from the decision of the Assistant Collector of Land Revenue, Seremban dated September 18, 1973 in which the Assistant Collector dismissed the appellant's application for an order of sale of a piece of land under section 260 of the National Land Code charged by the respondents to the appellant in respect of two charges one dated March 4, 1959 and another dated May 19, 1959. It appears from the record that for the purpose of the application all the necessary documents required to be filed and served by the appellant were in order and there was no objection taken by the respondents thereto at the hearing of the application. Both parties were represented by counsels in the enquiry before the Assistant Collector. The appellant was at the material time a licensed moneylender.

The respondent No. 1 on July 30, 1971 filed an affidavit in the Land Office alleging *inter alia* that he and the other respondent did not receive any money mentioned in the second charge and that the second charge was executed under a mistake induced by the appellant and that repayments in the sum of $1,460 had been made towards the first charge and he pleaded that the requirements of the Moneylenders Ordinance, 1951 were not complied with and also pleaded that the appellant's claim was barred by limitation.

The enquiry under section 261(1) of the National Land Code should have been in the form of show cause by a chargor why the order for sale should not be made against him. However from the notes of evidence taken by the Assistant Collector the enquiry went further wherein allegations of fraud, mistake, *non est factum*, limitation, non compliance with the Moneylenders Ordinance, Stamp Ordinance and Evidence Ordinance were made.

The appellant after being affirmed gave evidence as to the two loans leading to the execution of the charges and produced all the documents that would have ordinarily be required to be produced in any Court of Law in order to prove his case.

The Assistant Collector then proceeded to hear the allegations of the respondents by referring to the affidavit of the respondent No. 1 dated July 30, 1971 above. The appellant denied all the contents of the affidavit.

The appellant thereafter affirmed again and he stated the amount that was due to him and interest after taking into consideration the repayments made was in the sum of $5,377.40.

There appeared to be some difficulty in understanding by the respondents who are Tamils of the proceedings and their counsel requested a Tamil Interpreter be provided to assist them in giving their evidence. This application was refused by the Assistant Collector.

Both respondents then affirmed in Tamil as it appeared one after the other. It also appeared from the record that the respondents affirmed in Tamil and it was not recorded in what language they spoke, presumably in Bahasa Malaysia. All the evidence of the parties were recorded in the third person and not in the usual first person.

At the end of the enquiry the Assistant Collector gave the decision which in accordance with the translated version by the Court Interpreter reads as follows:—

"I have heard the evidence of both parties, and I was not satisfied with them. I therefore in accordance with section 263 KTN decide this case without any doubts, that this case is dismissed."

The Assistant Collector later refused to sign the draft order agreed upon by both counsels as to the enquiry.

However on July 18, 1975 he prepared grounds of judgment giving reasons why he dismissed the appellant's application. He gave four reasons in all. Firstly he said it was not clear whether the respondents received $1,000 or $1,300 and that whether the interest was $30 a month or 12% per annum, secondly the memorandum of loan was served on the respondents not by hand but by post and that the copy of the memorandum was unstamped, thirdly the second charge was not signed and lastly the respondents had paid to the appellant the sum of $1,460 and that the appellant did not issue receipts therefor and that receipts produced at the hearing were not valid as they were unstamped.

These grounds are somewhat inconsistent to what he earlier stated at the end of the enquiry that he was not satisfied with the evidence after hearing both parties. Further the respondents did not allege that they did not sign the second charge but alleged that when they signed it they were mistaken in that they did so as witnesses in a land deal.

There is nothing on record that either counsel submitted any points of law for the Assistant Collector to make up his decision, but he had disallowed a written submission of the counsel for the respondents.

In the appeal that was argued before me both parties quoted quite a number of cases and they were all based on facts adduced at the enquiry before the Assistant Collector, which facts I feel was very unsatisfactorily taken and devoid of the normal court rules and practice.

The point to be asked is whether the Assistant Collector has the powers under section 261 of the National Land Code to hear pleadings and defences arising in cases which are ordinarily heard by the courts. The Land Office is not a court under section 3 of Subordinate Courts Act, 1948. The National Land Code is silent on this point and it does not specify in so many words whether the Collector can or cannot adjudicate on pleadings stated above. However it provides that under section 419 of the Code the Collector may refer to the court any power or duty conferred or imposed on him by or under the Act.

In my opinion the Collector has no powers to adjudicate on the pleadings which are ordinarily heard in the courts. This is, in my view, the intention of the Legislature. To interpret otherwise, one may ask what would the position be if the chargor in an application for sale before a collector were to plead forgery, the Trustee Ordinance or counterclaim specific performance or for a declaratory order for the cancellation of the registered charges or such other orders?

Section 19(1)(b) of the Small Estates (Distribution) Act, 1955 gives powers to the collector to refer any difficult point of law to the High Court and in cases where there are collateral disputes, the collector may defer the making of any distribution order and is required to cause the disputes to be determined by the courts in cases of immovable property or any right or interests therein.

In *Ragavaniadoo* v. *Supramaniam Chetty*[1] the collector himself held that he had no power to decide what was "due on the charge". Sir T. Braddell C.J.C. in setting aside the order of the collector remitted the case to him for rehearing and directed that the collector should be satisfied as to the amount due to the chargee and that the chargor was in default of payments and the order of sale of the land should be made with regard as to whether it was necessary to sell the whole or only a part of the land in order to realize the amount due.

It would appear therefore that the powers of the collector in the enquiry should be limited. He should not go behind the charge in view of section 340(1) of the National Land Code relating to indefeasibility of title or interest and only the High Court possesses the power to set aside any registered interest of a proprietor, chargor or lessee in any land title.

In *Suppiah* v. *Ponnampalam*[2] which is a decision of the Court of Appeal, it was held that the collector is bound to accept the register and once he was satisfied that the charge with which he was concerned was on the register then the only question for him to decide was whether or not there had been a default in the payments provided for and if he was so satisfied he was obliged to make an order under the provisions of sections 141 and 142 of the National Land Code and he has no powers to investigate any allegation of fraud or misrepresentation and he could not have gone beyond granting a period of delay to enable the party making the allegation to take proceedings for rectification of the register under section 240.

In the instant case the Assistant Collector had a copy of the register before him and also the title having the charges registered therein. He was therefore bound to accept the register. Further there were implied agreements by the chargor under section 249(1) of the National Land Code in all charges that the chargor will comply with the provisions thereof as to payment of the sum or sums thereby secured, and with any provision for the payment of interest thereon.

Therefore any chargor who desires to challenge the legality of a charge in any case of fraud, misrepresentation, forgery, insufficient or void instrument or unlawfully acquired can do so by bringing a suit in the High Court under section 340 of the National Land Code.

My attention was brought by the counsel for the respondents to the case of *Tan Peng Pan* v. *Wong Fook Shang*[3] in which Yong J. held that the court has no jurisdiction to hear an application for an order of sale of land held under Land Office title by a chargor and that such application should be made to the Collector of Land Revenue. She contended that that was the reason why the respondents did not initiate any proceedings in the court.

With respect I would say that this case concerns only application by a chargee in seeking his remedies by sale of the land charged. It does not debar the chargor from bringing a suit in the court for an order involving the question of fraud, illegality and moneylending. If there is such a suit pending in the court any application in the Land Office by the chargee for an order of sale can be stayed pending the decision of the court as has been decided in *Sundram* v. *Chew Choo Khoon*,[4] where it was also held, following *Suppiah v. Ponnampalam* that the Collector of Land Revenue has no powers to investigate any allegation of fraud or misrepresentation.

I therefore set aside the order of the Assistant Collector of Land Revenue without prejudice to either party to take any fresh action they may deem necessary.

In view of my decision in this motion, I also dismiss the cross appeal in Originating Motion No. 67 of 1975.

In view of the circumstances of these cases, I make no order as to costs in both the appeals.

Order accordingly.

Solicitors: *Atma Singh Gill & Co.; Joseph & Son.*